BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the Trial Court is reported in 175 Misc. 295, and the opinion of the Appellate Division is reported in 262 App. Div. 136. These opinions also appear at pages 428 and 453 of the Record. The opinion of the Court of Appeals is reported in 287 N. Y. 510, and is also printed as Appendix A hereto.

ARGUMENT

POINT I

Since the Harriman Bank was hopelessly insolvent on March 3, 1933, and never thereafter met its regular banking obligations, and since the Comptroller took it in charge on that date through an examiner, the subsequent continuance of the Comptroller's control by appointment of a conservator was merely an administrative recognition of the true nature of the suspension in the case of the Harriman Bank. As of that date, not only the rights of creditors but also the obligations of debtors (including stockholders under assessment) became and have been fixed.

Hence, inasmuch as the defendant did not contract to buy stock of the Harriman Bank until some days later, he was not assessable under the Federal Statute and could not be liable to indemnify Blumenthal.

A person who, like the defendant, acquires bank stock after the bank has ceased to do a regular banking business "under a mandate of the state", is not subject to liability for assessment or indemnity "so long as the bank remains closed."

Broderick v. *Aaron* (*Kornberg*), 268 N. Y. 260, 266-8;

Broderick v. *Adamson* (*Greif*), 270 N. Y. 260, 264-5;
People v. *Merchants Trust Co.*, 116 App. Div. 41, aff'd 187 N. Y. 293.

Under the Presidential and Gubernatorial Proclamations, and by reason of its then hopeless insolvency, the official suspension of the Harriman Bank on March 3, 1933, was permanent. Thereafter the bank never transacted a regular banking business and never met its regular banking obligations. The bank could not and did not obtain a license to reopen.

(1) The appointment of the conservator on March 13 was not the creation of an insolvency or of an inability and failure on the part of the bank to meet all its regular obligations. It was merely the date of administrative recognition of these basic facts as existing on March 3. The prior existence of these facts had required a little time for examination and ascertainment.

The Comptroller had taken the bank in charge through an examiner on March 3 (fols. 1263-4, 955, 961-4, 972-3, 991-2, 88-9, 133, 1066-7). He continued his control through another administrative officer on March 13.

From March 3 the bank was in custodial conservatorship by the Treasury Department and could not act without the Department's permission (fols. 1066-7, 1078-9, 1085, 1147-9, 1153, 1059).

The bank was then and thereafter as much in conservatorship by the Department as if an agent with a title "conservator" had been appointed at once. Under the National Banking Act (§ 203) a conservator is merely the Comptroller's agent to take possession and to "take such action as may be necessary to conserve the assets of such bank pending further disposition of its position as provided by law." Precisely this was what the Comptroller himself did as of the date of these executive proclamations.

(2) Moreover, the Presidential and Gubernatorial Proclamations did more, and were intended to do more, than create "a bank holiday" at the end of which each bank would as of course resume where it had left off. On the contrary, by those proclamations the continuous conservation of assets was intended, and the Comptroller immediately took each bank in charge through an examiner. Each bank was permanently closed and in charge of the Comptroller unless and until it received from him "a license" "to reopen for the purpose of all usual and normal banking functions" (fols. 1147-9, 1153, 1059, 1079).

In other words, this particular holiday included the purpose of enabling the proper banking authorities, at a time when all banks were suspended, to determine by examination as of the initial date of such suspension, which were in a position to reopen under the dire financial conditions of the depression, and to keep closed those which were found to be insolvent. The Secretary of the Treasury thereupon found the Harriman Bank to be insolvent "by a large sum" as of March 3, 1933 (fols. 972-4). Hence, for that bank the "holiday" had and could have no end. The closing was permanent, and the rights and obligations of all parties became and were fixed as of that date.

(3) Furthermore, the entire basis of the stockholders' liability is predicated on the theory that depositors should be able to determine from the list of stockholders whether they desire to deposit and to insure vigilance over management.

Obviously, this reason for double liability could not run beyond the moment when the bank closed its doors on Friday, March 3, 1933. At no time while the bank was still open for deposits in the regular course of banking business, would any depositor have seen the name of the defendant on the stock records. No debt was contracted or could have been contracted on the strength of his responsibility as a stockholder.

Such deposits as were received after March 3 were kept segregated (fol. 164), each being carried in a separate trust account and available for immediate refund, unmingled with the general assets and liabilities of the bank (fols. 1092-6). They were not made on the general credit of the bank.

So, likewise, all management of the Harriman National Bank by its officers and directors as a going concern conducting an ordinary banking business ceased when the bank closed its doors on March 3, 1933. Thereafter the bank was continuously in charge of the Comptroller, first through his examiner and later through his conservator and subsequent receiver.

Thereafter, also, neither the management nor any stockholder could have discharged responsibility for banking operations in the ordinary sense, for there were no such operations. No new liabilities could be incurred.

POINT II

Moreover, the Treasury Department itself fixed the sixty-day period for assessment as terminating on March 3, 1933.

The force of that decision and of that practical construction is obvious, and our State Court of Appeals had no power to modify it or to fix a different period.

(1) The plaintiff himself called as a witness Mr. John M. Jordan, the Comptroller's assistant in charge of the levying of the assessment in the case of the Harriman Bank.

On direct examination by the plaintiff's own counsel, Mr. Jordan testified that notices of the assessment were sent to all who were stockholders of record on March 3 and to "all sixty-day transferees." To quote (fol. 89):

"Q. By sixty-day transferees you mean what? A. Anybody who sold stock, transferred stock, within sixty days prior to the Bank's closing.

"Mr. Tuttle: What day was that?

"The Witness: March 3, 1933.

"Q. That was when it closed, as all banks did at the inception of the Bank Holiday? Is that right? A. All banks in the State of New York were closed by Proclamation of the Governor; and the next day, the Saturday, the President of the United States closed all banks in the United States."

And on cross examination Mr. Jordan testified in answer to a question by the Court (fol. 133):

"*By the Court*:

"Q. When you say within the sixty-day period, do you fix a specific day for the sixty-day period to begin? Do you make it March 3rd? A. March 3rd.

"Q. Within sixty days of March 3rd you call the sixty-day period? A. That is right.

"The Court: Very well."

(2) This is further established by the Treasury Department's Circular Letter No. CR-7 (next Point hereof), and by the fact that the Comptroller examined the bank and determined insolvency as of March 3, 1933 (fols. 955, 961-4, 972-4).

(3) It is true that on January 4 and January 15, 1935, the Receiver sent to the defendant Rosenbaum an assessment notice on 35 and 57 shares respectively (fols. 1036, 1048). Both these notices merely stated that "You *are* the owner of" these respective shares (fols. 1037, 1049). Neither notice stated when Rosenbaum became, or was claimed to have become, such owner; and, of course, he was not in law liable to assessment simply because he was the owner of shares in 1935. Apparently at that time, and since Rosenbaum never became a stockholder of record at

all, these notices were sent as a precautionary measure, the Receiver not knowing but that Rosenbaum may have acquired his interest in the stock within the Comptroller's sixty-day period, to wit, on or prior to March 3, 1935.

(4) Under Title XII of the United States Code, Annotated, having to do with "Banks and Banking," Sections 14, 203 and 211, the Comptroller of the Currency had the familiar power to make, fix and levy the assessment, including all operative decisions connected therewith. The principle that such decisions by the Comptroller in the exercise of his functions under the National Banking Laws will not be reviewed or modified by the courts is familiar and well settled.

Liberty National Bank v. *McIntosh,* 16 F. (2d) 906, 909 (C. C. A.);
Kennedy v. *Gibson,* 75 U. S. 505;
Adams v. *Nagle,* 303 U. S. 532, 540;
District of Columbia v. *Wardell,* 32 F. Supp. 769, 771;
Church v. *Hubbard,* 91 F. (2d) 406;
Way v. *Camden Safe Deposit & Trust Company,* 21 F. Supp. 700.

POINT III

Indeed, the Treasury Department not only fixed March 3, 1933, as the termination of the sixty-day assessment period for the Harriman Bank, but it made a general ruling that, as to any bank which failed to reopen because of insolvency on the date of the Gubernatorial or Presidential Proclamation, such date should be deemed the official date of closing as of which the basic deficiency should be calculated and the respective rights and obligations of the creditors and the debtors (including shareholders) should be deemed fixed.

(1) The Circular Letter of the Treasury Department (Circular Letter No. CR-7 of June 9, 1933), in evidence as Defendant's Exhibit I (p. 421, fol. 1261), is entitled as follows:

> "Concerning the determination of the official date of closing of banks in conservatorship or receivership under banking holiday proclamations or acts."

This Circular Letter declares (the italics being ours):

> "Prior to the emergency in the banking situation resulting in banks being closed under banking holiday proclamations issued by the States, or under the subsequent Presidential proclamation of March 6, 1933, the official date of closing of a bank for liquidation and set-off purposes was easily determined. Such date was either the date a bank voluntarily closed by action of its board of directors suspending its operation or the date of involuntary closing of the bank *by action of the Comptroller taking it in charge through a receiver or examiner.* However the determination of the official date of closing since the issuance of such proclamations is a more difficult matter, and the following rules have been worked out as a basis of fixing such date:

"1. Where prior to the Presidential proclamation, a banking holiday Proclamation or act was issued by the State in which the subject bank is located, and the bank immediately thereafter closed in pursuance of such State proclamation or Act, *such date of closing should be taken as the official date of closing, assuming such bank thereafter remained closed.* * * *

"4. Where a bank continued in operation to March 6, 1933 (notwithstanding it may have been upon a restricted basis as explained above) but closed on March 6th and thereafter remained closed, the official date of closing of such bank will be March 6, 1933. * * *

"5. The date of appointment of a conservator or receiver (as the case may be), for a bank which was, at the time of such appointment already closed by Presidential Proclamation of March 6, 1933, or under a State Proclamation, is not to be taken as the official closing date of the Bank, inasmuch as the conservator or receiver was not appointed until subsequent to the actual closing of the bank. Consequently, the official closing date should be determined in accordance with the principles indicated in numbered paragraphs (1), (2), (3) and (4) above, regardless of the date of appointment of the conservator or receiver. * * *

"8. The official date of closing of a bank having been fixed in accordance with the foregoing instructions, it follows that as a general rule (subject to exceptions indicated in specific instructions from time to time issued), the rights of all depositors and creditors of a bank are fixed or 'frozen' as of the official date of closing of such bank."

(2) The principle that such operative decisions made by the Comptroller of the Currency in the exercise of his functions under the National Banking Laws will not be reviewed by the courts, is familiar and well-settled. See Point II, *supra.*

It is obvious that Circular Letter No. CR-7 falls within this well-settled principle.

This was squarely held concerning this very Circular Letter in *Bryce* v. *National City Bank of New Rochelle* 17 F. Supp. 792, aff'd 93 Fed. (2nd) 300 (Second Circuit), where the court decided that the rights and duties of all parties as regards the bank as a going concern came to a fixation on March 4, 1933, when the bank was in fact insolvent and ceased to do a regular banking business as a result of the Governor's Proclamation.

After quoting paragraphs "1", "5" and "8" of Circular Letter CR-7, the District Court concluded (p. 798):

> "As to such matters of administration which are left to the discretion of the Comptroller of the Currency, his powers are plenary and not subject to court review."

(3) The Appellate Division's opinion argues (fol. 1374) this this Circular Letter "simply fixed a date for the adjustment of the rights of creditors and depositors".

That argument overlooks that even if (contrary to the plain fact) this was all that there was in this Circular Letter, such a date would necessarily also be the date as of which the deficiency for the purpose of assessing stockholders would have to be determined. Indeed, that was the very date as of which the Treasury Department levied the present assessment. See Point II, *supra.*

(4) The case of *Pyne* v. *Jackman,* 12 Fed. Supp. 653, cited by the Appellate Division (fol. 1372) did not concern the Harriman Bank and is easily distinguishable.

In the first place, in that case there was not, as there is here, proof of insolvency on March 3, 1933. The court expressly said (p. 655) the insolvency on that date could not be implied solely from the fact that a conservator was later appointed on March 31, 1933.

In the second place, the *Pyne* case was not a final decision. While it granted the defendant's motion to dismiss the complaint for insufficiency, it also granted the plaintiff leave to amend.

In other words, the plaintiff was given the opportunity to insert by amendment the missing allegation as to actual insolvency as of the date of the proclamation.

In the third place, the *Pyne* case was decided several years before the decisions of the Supreme Court of the United States in *Oppenheimer* v. *Harriman Bank,* 301 U. S. 206, and in *Yonkers* v. *Downey, Receiver,* 309 U. S. 590, *post,* and before many of the other decisions on the point hereinafter cited.

Indeed, if given the construction claimed by the Appellate Division, the *Pyne* case must be deemed overruled by the aforesaid later decision of the same Federal Court, Southern District of New York (affirmed by the Circuit Court of Appeals for the Second Circuit), in *Bryce* v. *National City Bank,* 17 Fed. Supp. 792, aff'd 93 Fed. (2nd) 300 (C. C. A. 2d).

POINT IV

The decision of this Court in *Yonkers* v. *Downey, Receiver,* 309 U. S. 590, rehearing denied 310 U. S. 656, is conclusive that the closing on March 3, 1933, under mandate of the Government and continuous thereafter because of serious insolvency, is the date as of which the Bank must be deemed to have failed to meet its obligations, notwithstanding that up to March 13 it did a limited business under the restrictive Treasury Regulations.

That decision affirmed the decision of the Circuit Court of Appeals for the Second Circuit in 106 F. (2d) 69, which in turn affirmed the decision of the trial court in 23 Fed. Supp. 1018.

There the Supreme Court had before it the President's proclamation issued at 1:00 A. M. on March 6, 1933; the fact soon ascertained by the Comptroller that the First National Bank & Trust Company of Yonkers (up till then

a going bank) was actually insolvent at the time of the proclamation; and the further fact that up to the appointment of the conservator on March 20, 1933, the Bank had continued to carry on all the limited business permitted by the restrictive Treasury Regulations. The question was whether March 6 or March 13 was the date of fixation. The Supreme Court expressly affirmed the ruling of the trial court that (p. 594):

> "The Bank was insolvent March 6th, 1933, and as of that day the rights of creditors became fixed."

In the first instance, District Judge KNIGHT had held the same thing in 23 Fed. Supp. 1018, at page 1022:

> "The purpose of the appointment of a conservator is to hold matters in status quo pending a receivership or some change which may allow the bank to reopen. Between the official closing of a bank and the appointment of a conservator or receiver, additional liabilities may not be imposed upon the assets of a bank. *Bryce* v. *National City Bank of New Rochelle, D. C.*, 17 Fed. Sup. 792. • • • It follows therefore that the rights of creditors relate back to the date of the closing of the bank pursuant to the President's Proclamation of March 6, 1933. *Goess* v. *Heckscher*, Opinion by KNOX, *J.* (D. C. S. D. N. Y.); *Hardee* v. *Washington Loan & Trust Co.*, 67 App. D. C. 241, 91 F. 2d 314; *Mine Safety Appliance Co.* v. *Dehne*, Feb. 3, 1938; *Bryce* v. *National City Bank of New Rochelle, supra.*"

POINT V

There are many decisions of Federal and State courts holding that where a bank was insolvent as of the date of the Gubernatorial or Presidential Proclamation and in consequence never reopened for regular banking business, that date must be accepted as the official date of closing, fixing the rights of creditors and debtors and terminating the assessment period as regards stockholders.

Many of these cases involved the Harriman Bank itself.

SUBDIVISION I

Cases Involving the Harriman Bank

Take for example *Oppenheimer* v. *Harriman National Bank & Trust Co.*, 301 U. S. 206, which contains the following extremely pertinent language by this Court (p. 207):

> "Being unable to meet current demands, it (the Harriman Bank) closed March 3, 1933."

And at page 214 the same opinion of this Court says (the italics are ours):

> "We assume that after March 3, 1933 the Bank was without means sufficient to meet current demands and that its debts exceeded the value of its assets, *plus the statutory liability of its stockholders.*"

Another example is *Goess* v. *A. D. H. Holding Corporation*, 85 F. (2d) 72 (C. C. A. 2d) where, concerning this closing of the Harriman Bank the Circuit Court of Appeals said at page 74 (the italics are ours):

> "It is settled that a shareholder may not avoid the *statutory liability for assessment* by rescinding after the bank's 'failure,' which we understand to mean insolvency."

To the same effect, and involving the Harriman Bank, are:

Goess v. *Ehret*, 85 Fed. (2d) 109 (C. C. A., 2d);
Gimble v. *Harriman Bank*, 11 Fed. Supp. 836, 839; (rev'd on other grounds, 83 Fed. [2d] 153);
Goess v. *Heckscher*, an unreported decision by Judge Knox on December 1, 1934.

SUBDIVISION II

Stock Assessment Cases Involving Banks Other Than the Harriman

In the following cases the stock assessment period was held to terminate with the last date when the bank (actually insolvent) did an unrestricted banking business, even though a conservator or receiver was not appointed, or formal liquidation proceedings did not begin, until later.

State v. *Harris*, 59 Ohio App. 165, aff'd 135 Ohio St. 449;
Willing v. *Jensen*, 17 Fed. Supp. 596, 598;
Willing v. *Pennsylvania Co.*, 21 Fed. Supp. 233;
Willing v. *Delaplaine*, 23 Fed. Supp. 579, 580;
Smith v. *Witherow*, 102 F. (2d) (C. C. A. 3d) 638, 640.

The theory of these cases, as stated in the first *Willing* case, *supra*, is (p. 598):

> "It is thus obvious that the so-called restricted paying basis upon which the bank was admittedly placed after February 28, 1933, was not a paying basis at all so far as concerned the depositors and other creditors whose claims had accrued prior to that date."

And in the *Smith* case, *supra*, the Circuit Court of Appeals had before it a national bank which went on a restricted paying basis on February 18, 1933. In an

action to recover a stock assessment the question was whether or not the statutory sixty-day period ended on that day or ran along until the restricted paying stopped and liquidation began. The Circuit Court of Appeals unanimously held that the sixty-day period ended when the restricted paying basis began. The Court stated (p. 640):

> "A national bank is insolvent within the meaning of the National Bank Act, 12 U. S. C. c. 2, 12 U. S. C. A. § 21 et seq. when it is unable to meet its obligations as they mature. *Roberts* v. *Hill*, C. C., 24 F. 571; *Kullman & Co.* v. *Woolley*, 5 Cir., 83 F. (2d) 129; *Willing* v. *Eveloff*, 3 Cir., 94 F. (2d) 344."

There are many other cases which apply the same principle in determining the date as of which the rights of creditors and debtors of an insolvent bank are to be deemed fixed. These cases hold that such date is the date when the insolvent bank's doors closed and never reopened or the date when the insolvent bank went on a restricted paying basis which subsequently evolved into liquidation.

In some of these cases, following the ruling of the Comptroller of the Currency set forth in Point II, *supra*, the courts applied this principle to the restricted paying basis imposed by these very Gubernatorial and Presidential Proclamations during the first week of March, 1933.

Daly Brothers, Inc. v. *Hickman*, 61 Washington Law Reporter 802, 804 (Supreme Court, D. C.);

Dehne v. *Mine Safety Appliance Co.*, 94 F. (2d) 956, 958 (C. C. A. 3);

Hardee v. *Washington Loan & Trust Company*, 91 F. (2d) 314, 317 (U. S. Court of Appeals, Dist. of Col.);

In re Battini, 6 Fed. Supp. 376;

J. L. Hudson Co. v. *Thomas*, 6 Fed. Supp. 857;

Steele v. *Randall*, 19 F. (2d) 40 (C. C. A. 8).

In the case of *Daly Brothers, Inc.* v. *Hickman, supra,* the Supreme Court of the District of Columbia said (p. 804):

> "It was the purpose of the President's proclamation to preserve the condition of the bank as it was on March 6, 1933, and the appointment of the conservator on March 14, 1933, was merely an administrative act on the part of the Comptroller of Currency to place in charge of the bank a representative of the Treasury Department."

And in the *Hardee* case, *supra,* the United States Court of Appeals for the District of Columbia said (the italics being ours) (p. 317):

> "In our opinion the effect of the President's Proclamation of March 6, 1933, was to close all of the banks, including the Federal American Bank, *as for a conservatorship,* and thus fixed the rights of their depositors and other creditors at that time, subject to subsequent licensing."

POINT VI

The interpretation by the State Court of Appeals of the Federal statute and its attempted distinction between the date as of which rights of creditors become fixed and the date of the termination of the sixty day assessment period are, we submit, not justifiable; and, in any event, present a question which should be reviewed by this Court.

(1) On the one hand, the Court of Appeals states that although a conservator was not appointed until March 13, 1933, nevertheless the Comptroller was right in fixing March 3, 1933, as the date when "the right of creditors" became fixed. To quote the opinion (287 N. Y. 510, 516):

> "When an insolvent bank was denied permission to reopen for regular business after the end of the

> banking holiday, though solvent banks then resumed their usual banking operations, the date when the *right of creditors* attached was properly fixed at the time 'when the facts indicated that the bank would not be able to pay its depositors in due course' though at that time the banking holiday was not completely at an end. (*Downey* v. *City of Yonkers*, 106 Fed. Rep. (2d) 69; affd., 309 U. S. 590. See, also, *Bryce* v. *National City Bank of New Rochelle*, 17 Fed. Supp. 792; affd., 93 Fed. Rep. (2d) 300)."

On the other hand, the Court of Appeals held that as to the liability of stockholders, the statutory period terminated with March 13, 1933, because, in the Court's opinion, not until then was there a "failure of such association to meet its obligations". To quote the opinion (p. 517):

> "The time when it appears that insolvency makes it impossible for a bank to meet all its obligations as they mature has been chosen by Congress as the appropriate date upon which the rights of creditors against the bank attach; the time when a bank is actually in default in meeting its obligations as they become due has been decreed by Congress as the appropriate date upon which the liability of stockholders of the bank attaches. Often, perhaps usually, the dates will coincide—not always."

This adoption of a different and later date as to when the indebtedness of stockholders became fixed is, we submit, contrary not only to the rules and determination of the Comptroller of the Currency as set forth in Points II and III, *supra*, but contrary to the decisions of this Court and of numerous Federal District Courts and State Courts discussed or cited in Points IV and V, *supra*.

(2) Moreover, the distinction is, we submit, unsound in principle.

The date which freezes the respectives rights and duties of the creditors and depositors must, of necessity, also be the date which freezes the rights and duties of the

stockholders and other debtors. It would involve a contradiction of terms to argue that the date which fixed the claims of the creditors did not also fix the liabilities of the debtors.

Creditors are entitled to a ratable distribution as of that freezing date according to the then *deficit;* and the stockholders, as debtors, have the obligation to contribute ratably to the making up of that self-same deficit as it then stood.

Assessment cases *are* insolvency cases; and in insolvency cases the rights of creditors and the liabilities of the stockholders mutually involve the calculation and the fixation of a deficit as of a given date. There cannot be one deficit and date for the creditors and another deficit and date for the debtor stockholders.

It is true that a bank may be insolvent and yet continue for a while to meet current demands. But that is not this case. This is a case where the bank ceased to do a regular banking business and, because of its then insolvency, failed ever to resume a regular banking business and for that reason has been liquidated as of the date when it first ceased to do a regular banking business.

If the bank had subsequently opened as a solvent, going institution, there might have been no occasion for an assessment, but it did not and could not. Hence, it never ceased to fail to meet all its current obligations.

POINT VII

The State Court of Appeals was also in error, we submit, in holding that the federal statute imposed on the "ultimate transferee" "a primary duty to meet the liability," and in holding that an ultimate purchaser who was not even a stockholder of record was liable in law to indemnify a prior holder with whom he had no relationship either of privity or of quasi-trust.

In any event, a question of such general importance should, we believe, be reviewed by this Court.

Even if transfer of the certificates to the defendant be deemed to have taken place within the sixty-day assessment period, the law did not, in our judgment, impose upon him any obligation of indemnity as regards Blumenthal.

The State Court of Appeals in its opinion construed the federal statute, and declared (287 N. Y. 510, 521):

> "The statute clearly indicates that Congress intended that the ultimate transferee should be under a primary duty to meet the liability for all other persons who were made subject to the liability only to the extent that such transferee failed to meet it."

We believe this erroneous. The statute creates no liability except to the Comptroller of the Currency. As to those falling within the sixty-day period it expressly declares:

> "The stockholders * * * shall be *individually* responsible."

The statute says nothing at all about liability *inter sese*. It places on no one of the stockholders within the sixty-day period a primary obligation not equally resting upon all the others. It sets up no principal creditor or principal debtor and classifies no one as surety.

The Court of Appeals (p. 518) quotes the expression in the statute that the first holder shall be liable only

> "to the extent that the subsequent transferee fails to meet such liability."

This expression emphasizes rather than militates against our point. It merely means that where one of a number of debtors equally liable has paid in whole or in part, no other debtor shall be liable to make such payment a second time. The expression had to do solely with *preserving* liability on the part of a stockholder who had made a transfer within the sixty-day period. It said nothing at all about any liability by the later stockholder to the earlier. If the statute had intended a primary and secondary liability or a principal and surety relationship, it would not have confined its statement as to liability solely to the liability to the Comptroller.

This, we repeat, is a suit solely at law. It was not brought in equity. The only parties to it are Blumenthal's assignee and the defendant. Blumenthal was never under any obligation to the defendant. He never had any duties, equitable or legal, as regards him. There were several intervening transfers of record. Hence, the defendant has never had any obligation to Blumenthal. There never was any privity between them.

The Court of Appeals speaks of "well-established equitable principles" whereby the owner of stock, having the right to receive all the benefits, must also meet all the burdens; but the attempted application of this proposition to the present case strikes us as a clear begging of the question. No judicial decisions in support of such application are cited. All the cases cited in the respondent's brief in the Court of Appeals, when examined factually, show a conventional relationship of principal and surety, a direct privity in obligation, or a quasi-trust relationship whereby the right of one to receive the benefits from another creates a correlative obligation to relieve the latter of the burdens. The defendant never had any right to receive any benefits from Blumenthal.

There are two theories upon which a purchaser of stock is at times held liable to indemnify a record owner for payment of an assessment:

(a) The implied contract theory.

(b) The quasi-trust theory.

Neither can be applied in this action at law.

The implied contract theory is the so-called English rule. The English courts imply a promise by a vendee to indemnify his immediate vendor against any loss which the latter may incur at any time because of his status as record owner. Hence it is immaterial whether or not such vendee is still the real owner of the stock.

Spencer v. *Ashworth, Partington & Co.*, 1925, 1 K. B. 589;
Kellock v. *Enthoven*, L. R. 9 Q. B. 241.

The quasi-trust theory rests not on a past vendor-vendee relationship, but upon a present, existing trust relationship.

This is the theory heretofore followed in the State of New York.

As said by the Court of Appeals in *Broderick* v. *Aaron* (*Rice*), *supra* (264 N. Y. 368, 378):

> "In so far as the law implies correlative obligations solely from the *quasi*-trust relationship, they depend upon privity of estate and cease when that privity terminates. That is true alike where the *cestui* is the original buyer and where the *cestui* is a subsequent assignee."

Again the Court of Appeals said (p. 377):

> "No cases have been cited to us from any American jurisdiction where the obligation to indemnify a seller of stock has been extended beyond the time when the *quasi*-trust relationship between buyer and seller ceased."

And the Court further said (p. 377):

> "Seller and buyer occupy a *quasi*-trust relationship as long as the seller remains the holder of record and the buyer remains the actual owner of the stock."

This *quasi* trust theory of correlative rights and duties has been of long standing and well founded in the law of the State of New York.

> *Johnson* v. *Underhill*, 52 N. Y. 203, 210-11;
> *Currie* v. *White*, 45 N. Y. 822;
> *Gaffney* v. *People's Trust Co.*, 191 App. Div. 697, affirmed 231 N. Y. 577;
> *Richards* v. *Robin*, 175 App. Div. (1st Dep't) 296, aff'd without opinion, 225 N. Y. 719;
> *Broderick* v. *Alexander* (*Kahn*), 268 N. Y. 306, 309.

In the case at bar there was and is, as between Blumenthal and Rosenbaum, a complete absence of any trust relationship of record holder to beneficial owner—indeed of any relationship at all.

There is no prior judicial decision in New York or any other jurisdiction holding that a purchaser of bank stock is bound, in connection with a stock assessment by governmental mandate, to indemnify holders of record who were such prior to the record ownership which existed at the time of his purchase. Nor does the federal statute declare any such obligation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated April 24, 1942.

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